Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-356

CALL CARL, INC., ET AL.,
Petitioners,

v.

BP OIL CORPORATION AND
THE STANDARD OIL COMPANY (OHIO),
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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had pendant jurisdiction when, under applicable state law, there was insufficient evidence of two essential elements of the claim?

3. Was not the Court of Appeals correct in deciding that a party cannot assail on appeal a remittitur which it has accepted?

STATEMENT OF THE CASE

From its incorporation in 1969 until 1973, BP Oil Corporation ("BP"), marketed gasoline and lubricants in the conventional way. BP sold its products outright to independent dealers under written contracts expressly terminable at their expiration dates upon thirty days prior notice, who, in turn, resold them to the motoring public at service stations which they leased from BP by similarly terminable written leases. Most dealers offered normal automotive services as well.

Petitioners were ten independent dealers who, at various times prior to 1973 in the Washington, D.C. area, leased BP stations and purchased BP products for resale under these written leases and supply contracts. The fully integrated agreements were expressly self-renewing for additional terms, but only if neither party elected, for any reason whatever, to give the other party thirty days' notice of termination.

Throughout the years 1970-1972, BP suffered extremely heavy losses in all of its departments including marketing, and by the fall of 1972, it had withdrawn marketing operations in several states and was re-evaluating its sales program in the Washington, D.C. area. Eventually BP, to prevent or reduce such losses, was forced to decide to change its entire method of marketing by discontinuing wholesaling to independent dealers and by selling its products directly to the public at employee-operated stations. These outlets were to be high volume, no-frill, Gas & Go stations, providing

customers with gasoline and oil but no additional services or non-petroleum products.

In September of 1973 BP gave timely written notices to each of its Washington dealers, including Petitioners, that the leases and supply contracts would not be renewed upon their respective termination dates. In the notices of termination, BP offered each Petitioner employment as manager of a Gas & Go station, but each Petitioner refused to accept the offer.

In November 1973, Petitioners filed a five count complaint charging that BP and its parent company, Sohio,[1] had violated the Sherman Act by terminating Petitioners' leases and contracts as part of a price fixing conspiracy. The complaint also charged that both companies (a) had violated regulations of the Federal Energy Administration by changing BP's marketing methods, (b) had breached the dealers' current leases and contracts by giving the notices of non-renewal, and (c) had committed torts of common law deceit by BP's making fraudulent oral promises of lease renewals in perpetuity to each Petitioner.

In 1975 the case was tried in the United States District Court for the District of Maryland. The District Court directed a verdict in Respondents' favor on the Sherman Act count but submitted the other issues to the jury.

The jury found that Respondents had committed no breaches of contract or violations of the FEA regulations. It did, however, return large verdicts for each of the ten dealers upon the deceit count. Finding these verdicts (which aggregated $1,265,000) "grossly excessive and shocking to the conscience", the District Court ordered a remittitur of approximately half that amount.

[1] In 1970, BP became a wholly-owned subsidiary of the Standard Oil Company (Sohio), which transacted no business in BP's East Coast territory.

Petitioners accepted the remittiturs under protest, and both sides appealed.

The Court of Appeals for the Fourth Circuit affirmed the directed verdict on the Sherman Act count, but reversed the judgment on the deceit count primarily because of the erroneous instructions on damages. It did not, however, remand for a new trial because (1) there was insufficient evidence of any damages to justify an award on any permissible state law theory, and (2) Petitioners could not have *reasonably relied* on BP's allegedly false oral promises, as is required by the Maryland law of deceit, since the alleged statements were directly contrary to the express termination provisions in Petitioners' written contracts with BP. The Court of Appeals also found that Petitioners, having accepted the remittiturs, could not object to them on appeal.

ARGUMENT

I.

PETITIONERS' ANTITRUST CLAIM IS BASED UPON THE ERRONEOUS PROPOSITIONS THAT A COMPANY CAN CONSPIRE WITH ITS OWN EMPLOYEES AND THAT IT IS ILLEGAL FOR A COMPANY TO DETERMINE THE PRICE AT WHICH ITS EMPLOYEES WILL SELL ITS PRODUCTS.

The core of Petitioners' contention is that BP's decision to market directly to the public through employee operated Gas & Go stations was a "price fixing scheme", since one of BP's objectives was to control the price at which it would sell its own products to consumers. Building on this premise, Petitioners next contend that BP's non-renewal of their leases and supply contracts constituted a refusal to deal in furtherance of this scheme and that BP conspired with its Gas & Go station employees to fix prices.[2]

[2] Petitioners did not appeal from the District Court's rejection of their theory that BP and its parent, Sohio, were engaged in a horizontal conspiracy, and they do not seek to revive that theory in this Court (A. 9a n.4).

Both the District Court (A. 32a-33a) and the Court of Appeals (A. 8a-11a) found that Gas & Go managers were *bona fide* BP employees and not independent dealers. The application of well-settled antitrust law to this conclusion correctly led both courts to reject each of Petitioners' said contentions. (1) It is perfectly legal conduct for a company, lacking a monopoly, to set the price at which employee-operated outlets sell its own products. *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964). Thus BP's Gas & Go marketing plan was not a price-fixing scheme. (2) BP terminated Petitioners' leases and supply contracts upon their termination dates as a necessary preliminary to adopting the legal Gas & Go direct marketing plan. Thus, the non-renewals were not refusals to deal in furtherance of any illegal price-fixing scheme. *Knutson v. The Daily Review, Inc.*, 584 F.2d 795 (9th Cir. 1977). (3) A corporation cannot conspire with its own employees. Thus, there could be no conspiracy to fix prices between BP and its Gas & Go managers. *Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203 (5th Cir. 1969).

Citing *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), Petitioners argue that BP's Gas & Go managers were not employees *at the time* BP successfully solicited them to run its stations; therefore, the managers were legally capable of conspiring with BP. Nothing in *Albrecht* lends any support to this fanciful theory. In that case a newspaper wholesaler conspired with a circulation company and an independent distributor to coerce the plaintiff, another independent distributor, to lower his retail newspaper price. In footnote 6, this Court said that a conspiracy might also have existed between the wholesaler and independent distributors (including plaintiff) who adhered under duress to the illegal resale price policy. Both the Court of Appeals (A. 9a) and the District Court (A. 31a) were aware of and correctly cited *Albrecht* as indicating that BP might

have been guilty of price-fixing had its Gas & Go managers not been *bona fide* employees. Since they were employees, BP could not conspire with them and could legally determine BP's prices at which they could sell.

Uncontradicted basic facts established that BP's Gas & Go managers were *bona fide* employees of BP completely different from the consignees in *Simpson*. BP paid these managers commissions and a guaranteed minimum salary and all station operating costs except the wages of subordinate station helpers and cash shortages. BP even paid the FICA, unemployment, workmen's compensation and social security taxes on all of the station employees including the managers, all bookkeeping expenses and bore all losses of products due to leakage, etc. The only benefit a salaried manager received which was not given a Gas & Go manager was one week's vacation each year.

Petitioners seem to contend that this case provides some vehicle for clarifying issues raised but unanswered in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 45 U.S.L.W. 4828 (U.S. June 23, 1977). The reasonableness of BP's Gas & Go marketing plan was obvious. Both the Court of Appeals (A. 11a) and the District Court (A. 36a) found that BP's non-renewal of Petitioners' leases and adoption of direct marketing was a reasonable reaction to the heavy losses it was sustaining while marketing in the conventional way. In fact, the District Court held that Petitioners had "failed entirely" to prove that BP's actions had any anticompetitive effect (A. 36a-37a).

II.

THE COURT OF APPEALS PROPERLY REVERSED THE JUDGMENT ON PETITIONERS' DECEIT COUNT SINCE, AS A MATTER OF MARYLAND LAW, THERE WAS INSUFFICIENT EVIDENCE TO RAISE A JURY QUESTION.

Petitioners claim that they renewed their short-term leases and contracts in reliance upon BP's fraudulent oral assurances that it would never exercise its contractual right of non-renewal. The Court of Appeals found, as a matter of law, that Petitioners had failed to establish two of the five essential elements of common law deceit under Maryland law. They could not prove reasonable reliance upon the alleged oral promises. They could not establish that they had sustained any damages as the result of them.

Petitioners argue (1) that the Court of Appeals exercised overly-broad review of a common law claim over which the federal courts have only pendant jurisdiction, (2) that the reversal of the jury verdict thus denied Petitioners the right to a jury trial, and (3) that the Court of Appeals misconstrued the law of Maryland.

All of these contentions are frivolous. Their argument is that the Court of Appeals had no power to review and reverse a district court's erroneous conclusions as to state law. Under Rule 52(a) of the Federal Rules of Civil Procedure, the findings of fact of a district court are not to be set aside unless clearly erroneous. Its conclusions of law are reviewable, however, without any such limitation. 9 Wright & Miller, *Federal Practice and Procedure*, §2588, p. 740 (1971).[3]

It is true that appellate courts will normally give substantial weight to determinations of state law by the

[3] The circuit courts exercise appellate review of the district courts in their respective circuits by authority of 28 U.S.C. §1291.

local district judge, especially when there is no direct state authority on the legal issue in question. This doctrine does not, however, strip appellate courts of the power to set aside wrong constructions of state law. *Robinson v. United States*, 518 F.2d 1105, 1108-09 (9th Cir. 1975); *Freeman v. Continental Gin Co.*, 381 F.2d 459, 466 (5th Cir. 1967); *Darby's Estate v. Wiseman*, 232 F.2d 792, 795-96 (10th Cir. 1963); 9 Wright & Miller, *supra*, §2588, pp. 752-53.

After an extensive review of the Maryland cases, the Court of Appeals concluded that there was insufficient evidence to justify a damage award under any theory. The sufficiency of the evidence is a question of law. 9 Wright & Miller, *supra*, §2524, pp. 541-542.[4]

The Court of Appeals also found under the authority of *James v. Goldberg*, 256 Md. 520 (1970)[5] that Petitioners had no right to rely upon BP's allegedly fraudulent oral promises that directly contradicted the clear termination provisions of their written contracts with BP. The construction of instruments is also a question of law not of fact. *Murphy v. Travellers Insurance Company*, 534 F.2d 1155, 1162, n.7 (5th Cir. 1976); *First National Bank of Miami v. Insurance Company of North America*, 495 F.2d 519, 522 (5th Cir. 1974).

Although these issues of Maryland law came before the Court of Appeals under its pendant jurisdiction, the

[4] There was no potential conflict between State and Federal law since the standard of sufficiency of the evidence as applied both by the State courts of Maryland and the Court of Appeals is substantially the same. *Tully v. Dasher*, 250 Md. 424 (1968); 9 Wright & Miller, *supra*, §2525, pp. 549-52.

[5] In this case, the highest court in Maryland upheld a directed verdict against plaintiffs in a deceit action, holding that they had no right to rely on oral statements that conflicted with the clear provisions of a written contract.

Court was entitled and, indeed, bound to review them. *United Mineworkers of America v. Gibbs*, 383 U.S. 715 (1966); 9 Wright & Miller, *supra*, §2588, pp. 752-53. The Petitioners cannot invoke pendant jurisdiction without also invoking appellate review.

Petitioners' suggestion that the reversal of the jury verdict denied them a jury trial is completely untenable. There was, as a matter of law, no issue for the jury to consider. Their last argument, that the Court of Appeals was wrong in applying Maryland law, is also insupportable, as a reading of the Court's well-reasoned and correct opinion makes clear.

III.

THE COURT OF APPEALS WAS CORRECT IN DECIDING THAT A PLAINTIFF CANNOT APPEAL FROM A REMITTITUR WHICH IT ACCEPTED.

The Petitioners ask this Court to resolve an alleged conflict among the circuits over whether a plaintiff may appeal from a remittitur it accepted under protest. There is no such conflict. As the Court of Appeals correctly noted, *Donovan v. Penn Shipping Co., Inc.*, 429 U.S. 648 (1977), resolved this question. This Court, in a *per curiam* decision, stated:

> "The Court of Appeals properly followed our precedents in holding that a plaintiff cannot 'protest' a remittitur he has accepted in an attempt to open it to challenge on appeal. A line of decisions stretching back to 1889 has finally established that a plaintiff cannot appeal the propriety of a remittitur order to which he has agreed. . . ." 429 U.S. 649.

The Court of Appeals reversed the jury's damage award and thereby mooted any issue of remittitur as well.

CONCLUSION

For the above reasons, this Court should not issue a Writ of Certiorari to review the Judgment and Opinion of the Court of Appeals for the Fourth Circuit, which is valid in all respects.

Respectfully submitted,

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